SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 415

HEINEL MOTORS, INC., AND ELMER W. HEINEL,
Petitioners,

vs.

CHESTER BOWLES, PRICE ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Opinion of the Courts Below

The United States Circuit Court of Appeals, Third Circuit, did not deliver a written opinion. It merely affirmed the order of the Court below. 149 F. 2d 815.

The District Court of the United States for the Eastern District of Pennsylvania delivered an opinion (printed page 181a) which is reported in 59 F. Supp. 759 (1944).

II

Jurisdiction

The jurisdiction of this case is invoked under Sec. 240 (a) of the Judicial Code, as amended, 28 U. S. C. A.

III

Statement of the Case

A statement of the case appears under heading "B" of the Petition for Writ of Certiorari. In the interest of brevity, that statement is not now repeated, but is referred to with the request that it be considered as here incorporated by reference.

IV

Questions Presented

The questions specifically brought forward by the Petition for Writ of Certiorari appear under heading "C" of the petition. Again, in the interest of brevity, they are not now repeated, but are referred to with the request that they be considered as here incorporated by reference.

V

ARGUMENT

Summary of Argument

1. That a trial judge has discretion in fixing the amount of damages under the Emergency Price Control Act and its Amendment.

2. That the evidence justified that all but one of the autos involved were sold under a "guarantee" basis.

3. That the burden of proving the age of the autos was upon the Administrator.

4. That the sales of the trucks in the case were not "in the course of trade or business."

I. The Court May Use Its Equitable Powers

In Judge Kirkpatrick's opinion on the question of the amount of the judgment, he states as follows (185a):

> "The suit being by a government agency, any judgment is in the nature of a penalty. While the defendant has no real defense to the charges against it, it has a number of excuses which have a certain amount of merit and which, if I were free to do so, would induce me to enter judgment for a sum considerably less than the amount of the overcharge. Reluctantly, I have reached the conclusion that I have no choice in the matter and that the judgment must not be less than the overcharge."

It is submitted that the trial judge has equitable powers to enter judgment for any amount that he sees fit. This was definitely established in the *Hecht* case.

> In *Brown* v. *Hecht Co.*, 49 Fed. Supp. 528, the United States District Court for the District of Columbia held the issuance of an injunction against violators of the Emergency Price Control Act and of the regulations issued thereunder lay in the discretion of the trial court and where it appeared that the defendant had made an honest effort to comply with the Act and the regulations and was not charged with bad faith, and that any violation which occurred was due to error in interpreting the act or regulation and was not intentional negligence and that there was no reason to anticipate further violations, the injunction was denied.

This decision was appealed by the Price Administrator to the U. S. Court of Appeals for the District of Columbia. There that Court held in *Brown* v. *Hecht Co.*, 137 F. (2nd) 689, that

> good faith was no defense and if a violation was shown, an injunction was mandatory.

This is the same position Judge Kirkpatrick felt he was compelled to take.

The case was appealed to this Honorable Court and in *Hecht Co.* v. *Bowles,* 64 Sup. Ct. Rep. 587, in an opinion by Mr. Justice Douglas, it was held that there was no doubt of the petitioner's good faith and diligence and said (p. 591):

> "We agree that the cessation of violations, whether before or after the institution of a suit by the Administration is no bar to the issuance of an injunction under Sec. 205(a). But we do not think that under all circumstances the Court must issue the injunction or other order which the Administrator seeks."

He further said that

> "The qualities of mercy and practicability has made equity the instrument for nice adjustment and reconciliation * * *" (p. 592).

In concluding, he said:

> "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility" (p. 592).

The Circuit Court was reversed and the action of the trial Judge upheld.

Since this decision in the *Hecht* case, a number of the lower courts have sustained this position, citing the *Hecht* case for authority.

As said by Judge Kirkpatrick, the Act is in the nature of a penal suit. This is true as far as the defendant is concerned and therefore should be strictly construed.

It is obvious that the trial judge does have equitable powers and therefore he can use his discretion and reduce the amount of the judgment to any sum which he deems proper.

II. The Amount of the Damages Should Have Been Fixed on a "Guarantee" Instead of on an "As Is" Basis and

III. Age of Vehicles

The chief points of difference as to the amount of damage between the Administrator and the defendant were first, the age applicable to each truck and second, whether a guarantee basis was to be used.

With regard to the age of the trucks, Sec. 1360.504 b provided prior to August 10, 1943:

That the age of the vehicle is to be determined:

> (1) The date of delivery of the vehicle when new to the person who purchased it if such date of delivery can be supported by original invoices or certified copies thereof; or
>
> (2) if the above is not available, then the first day of January of the year of the model was to be used.

(See opinion printed page 182a.)

In its opinion, the Court holds it against the defendant for not proving the age of the trucks in this manner. The burden of proof was on the plaintiff as the Administrator was seeking damages of the defendant. The Administrator did not show what efforts he had made to obtain original invoices or certified copies. Certainly, having the make and manufacturer's number and all other details of each of the trucks, this information could easily have been obtained. The Administrator merely relied on the presumptions indicated in the second method.

At the trial, when this developed, the defendant wired Lever Brothers from whom it had purchased these trucks and who were the original buyers. Lever Brothers wired back the dates of purchase of these trucks (163a). Certainly this was good evidence and if the Administrator failed to adhere to the regulations, he cannot insist that the

defendant do so. There is no contention that the information submitted by Lever Brothers was not correct. If the ages as given by the defendant are used, there is a substantial reduction in the damages on an "as is" or "guarantee" basis.

For the convenience of this Court, the defendant has set forth a recapitulation on Pages 177a to 180a inclusive. This tabulation shows any overcharges, using the Government's ages on the "as is" or "guarantee" basis and for the "as is" or "guarantee" basis, using the ages as established by the defendant. As will be noted in the summary, the differences are substantial.

As to whether to use the guarantee price or not depends upon whether the failure to attach a written guarantee deprives the defendant of his claim in this case. The evidence as previously stated and outlined in the record shows that three of the witnesses admitted having purchased under a guarantee basis. In these three instances, the Administrator accepts the "guarantee" prices, but refuses them in all other instances. Yet all the other purchasers admitted seeing the newspaper advertisements or hearing the radio or seeing the sign or taking advantage of the defendant's guarantee of three months or 4000 miles. Why the Administrator accepts three and not the others is a mystery. This point is commented upon by the trial judge in his opinion (182a).

It is submitted that the action of the defendant was made in good faith and that its feeling as to the original regulation MP 341 was affirmed when the revised MPR 341 was issued on August 10, 1943. The reasons given for the revision by the Administrator in the revised Regulation were substantially the contention of the petitioner.

It is again submitted that the preponderance of evidence as to the purchasers having knowledge of the guarantees

is in favor of the defendant and this is admitted by the Administrator when he accepted three such cases. Therefore, if there is to be any damages assessed against the defendant, equity and justice require that the lowest figure of $556.78 be adopted.

Possibly the trial judge had some such figure in mind when it said "* * * if I were free to do so, would induce me to enter judgment for a sum considerably less than the amount of the overcharge" (185a).

IV. Were the Sales Made in the Course of Trade or Business?

Section 205(e) of the Emergency Price Control Act provides as follows:

> "(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such a commodity for use or consumption *other than in the course of trade or business* may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is greater, plus reasonable attorney's fees and costs as determined by the court. For the purposes of this section, the payment or receipt for rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, and the buyer *is not entitled to bring suit or action* under this sub-section, the Administrator may bring such action under this subsection on behalf of the United States. Any suit or action under this sub-section may be brought in any court of competent jurisdiction and shall be instituted within one year after delivery is completed or rent paid."

Defendant admits that it agreed that all these purchases were made in the course of trade or business (23a). When agreed, it was thought that this meant that the purchasers used these trucks in their business. This point has been a great source of litigation. As an illustration in *Bowles* v. *Silverman,* (U. S. D. C., S. D.) 57 F. Supp. 990 it was held that a sale of farm equipment to a farmer for use in his farming operations is a sale in the course of trade or business and the exclusive right to sue for treble damages for violations of ceiling prices by the seller of such equipment is, therefore, vested in the Administrator.

To the same effect see *Speten* v. *Bowles* (U. S. C. C. A.—8th Cir.), 146 F. (2nd) 602. Certiorari denied, 65 S. Ct. 1023.

Yet, in our own District Court in the case of *Brown* v. *Malloy, OPA Opinions and Decisions,* Vol. 2, p. 2112, Judge Welsh held that the farmer buying farm machinery did not buy the same in the course of trade or business and that the interpretation of the Administrator was strained and illogical.

Bowles v. *Rogers,* 57 F. Supp. 987 (U. S. Dist. Ct. N. D. Ind.) held to the same effect as to farm tractors.

The Circuit Court of Appeals for the Seventh Circuit reversed this case in 194 F. 2d 1010.

Bowles v. *Whayne,* 60 F. Supp. 78 (1945) (U. S. Dist. Ct. W. D. Kan.) held to the same effect that sale of mining equipment to a mine for its use and not for resale was not a sale in the course of trade or business. Here all the cases pro and con are cited. The Price Administrator has appealed this case to the Circuit Court of Appeals for the Sixth Circuit where it is still pending as of No. 9992.

In *Bowles* v. *Seminole Rock and Sand Co.,* (U. S. D. C., Fla.) 59 F. Supp. 751, it was held that a sale of rock to a

railroad for use as ballast was not a sale in the course of trade or business for which the Administrator was entitled to maintain an action. There the Court said:

> "It makes no difference whether the ultimate consumer is the housewife purchasing a can of soup or the railroad purchasing a hundred thousand dollar Diesel engine."
>
> "As I construe the statute, the statute was aimed to give the ultimate consumer an action for three-fold damages * * * the object was two-fold. First, if the merchant or middleman in purchasing from the jobber or manufacturer was *particeps criminis* to the excessive charge, he could pass it down and would have been able to pass it down to the ultimate consumer, therefore, it would have been iniquitous to give him the right to recover three-fold damages when he was so deep in mud as the manufacturer in the mire; but the ultimate consumer had no place to pass it on and no temptation to pass it on, and therefore, the ultimate consumer is whom they mean 'in the course of trade or business.' They could have used more understandable language, but I construe it to mean 'ultimate consumer'."

Although the judgment in the above case was affirmed; on the above point, the U. S. Circuit Court of Appeals, Fifth Circuit 145 F. (2nd) 482, held the action was in the Administrator and not in the purchaser. This Honorable Court reversed the judgment in 65 S. Ct. 861, on other grounds.

It is admitted that the majority of the cases favor the Administrator. Yet this interpretation is forced when Section 4a of the act "Prohibition" is read. This section is quoted by the Administrator at Page 147a as follows:

> "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or

> hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity * * *."
>
> The Administrator then insists that "it is a crime for a person to buy a commodity in the course of trade or business above ceiling prices, and that they did not want to have merchants suing each other, because they are in pari delicto."

If, as the Administrator contends, the buyer and the seller are in pari delicto, then there is no explanation why the defendant was sued and not the buyers of these trucks. Certainly, if they were both guilty, both should have been sued and it is not even-handed justice to sue one party to an illegal transaction and not the other.

It would appear to be the better interpretation that "in the course of trade or business" means where persons in the same line of business buy or sell a commodity with which they are familiar and which is handled by them for profit.

As an illustration (20a) Mr. Beyer, who was a baker, would be familiar with the price of flour but would not be familiar with the price of trucks which he rarely purchased.

This view is also brought out in *Bowles* v. *Jos. Denunzio Fruit Co.* (U. S. D. C. W. D. Kan.) 55 F. Supp. 9. There it states that a purchaser who buys from a retailer for use or consumption may bring an action for treble damages for violation of the Emergency Price Control Act, but where a retailer buys from a wholesaler for re-sale in the course of trade or business and for use or consumption, the retailer has no right to bring a treble damage action, the right of action in such circumstances being vested solely in the Administrator.

It is certain that clarification is badly needed and now is the time to do so.

It is suggested that when "course of trade or business" is used, it means where two people deal on the same basis with a commodity of which both are familiar. Thus, in the sale of flour, in any transaction between the manufacturer, wholesaler, retailer or baker, none of these can sue for treble damages because they would know or should know that they were paying above ceiling prices and the transaction as to this merchandise was one where they were *particep criminis.*

Thus, one buying bread of a baker or a housewife purchasing flour from a grocery store could sue for treble damages in each case, because they were the ultimate consumer and they did not purchase for re-sale or profit and would not be familiar with the price of flour.

The same thing would apply in our case. If an ordinary person were to buy a used truck, he could sue for treble damages. If the same person bought the truck for use in his business, there should be no distinction and he too could sue. The reason is that he is not in the automobile business, is not familiar with prices or regulations, does not buy for re-sale or for direct profit and is the ultimate consumer.

It is upon this contention and the cases cited above that the defendant rests its argument that the Administrator cannot bring suit for treble damages. Note too, this situation is recognized in the Amendment to the Emergency Price Control Act of 1942, approved June 30, 1944, which provides that if the buyer does not bring suit within thirty days, then the Administrator may sue. See 1944 Amendment Sec. 108(b) and (c), which amends Section 205(e) of the Emergency Price Control Act of 1942 and which makes applicable the Amendment of June 30, 1944 to proceedings pending on that date.

In conclusion, it is submitted under the points raised above that either the case should be dismissed or referred back to the trial judge to determine what damages he deems just under the circumstances.

Respectfully submitted,

JOHN E. SHERIDAN and
SAMUEL I. SACKS,
By SAMUEL I. SACKS,
Counsel for Petitioners.